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No. 89-601

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATIONALIZATION SERVICE, ET AL., PETITIONERS

v.

MARIE LUCIE JEAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
WILLIAM G. KANTER
MICHAEL JAY SINGER
MARY K. DOYLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in a case where the federal government is liable for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987), it must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.

PARTIES TO THE PROCEEDINGS

Petitioners, who were defendants in the district court and appellants in the court of appeals, are the Commissioner of the Immigration and Naturalization Service (INS)*; the District Director of INS, District VI; the Assistant District Director for Deportation, INS, District VI; Officer in Charge, Krome Avenue North Detention Facility; the INS; and the Attorney General of the United States. Respondents, who were plaintiffs in the district court and appellees in the court of appeals, are Lucien Louis, Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, and Joel Casimir, on behalf of themselves and all others similarly situated; and the Haitian Refugee Center, Inc.**

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* Gene McNary was confirmed as the commissioner of the Immigration and Naturalization Service on October 26, 1989. We have accordingly added his name to the title of this case.

** Marie Lucie Jean and Harold Jacques were named as petitioners in an earlier habeas corpus petition, but their names were not included in the second amended class action complaint.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 863 F.2d 759. The opinion and order of the district court (Pet. App. 46a-99a) is reported at 646 F.Supp. 1300.

JURISDICTION

The judgment of the court of appeals (Pet. App. 100a-101a) was entered on December 27, 1988. A petition for rehearing was denied on May 17, 1989 (Pet. App. 102a-103a). On August 10, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to September 14, 1989, and on September 12, 1989, he further extended it until October 14, 1989. The petition for a writ of certiorari was filed on October 13, 1989, and was

granted on January 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. 2412(d) (1982 & Supp. V 1987), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
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> * * * * *
>
> (2) For the purposes of this subsection—
>
> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);
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> * * * * *

> (D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based[.]

STATEMENT

1. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d),[1] "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325. See S. Rep. No. 253, 96th Cong., 1st. Sess. 1, 5-6 (1979); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5 (1980); H.R. Rep. No. 120, 99th Cong., 1st Sess. 4, 12 (1985). Unlike certain other attorney's fee statutes,[2] EAJA does not authorize automatic fee-shifting. Instead, it provides that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. 2412(d)(2(B)) if that party prevails in a civil non-tort action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).

2. This attorney's fee dispute arises out of a class action brought in 1981 by respondents, as representatives of certain Haitian aliens detained by the Immigration and

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[1] Unless the context indicates otherwise, all references to EAJA herein are to the current version, which appears in 28 U.S.C. Supp. V.

[2] For example, in *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983), this Court, in referring to 42 U.S.C. 1988, stated that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' S. Rep. No. 94-1011, p. 4 (1976) (quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968))."

Naturalization Service,[3] to challenge a revised parole policy instituted by the INS in that year in response to an influx of undocumented excludable aliens from the Caribbean region. *Jean* v. *Nelson*, 472 U.S. 846, 848 (1985). Respondents' complaint, as amended, contained seven counts, each alleging a separate cause of action. Count 2 alleged that the new parole policy constituted a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and that the government's failure to follow APA rulemaking procedures rendered that policy unenforceable. The other counts alleged a number of other constitutional and procedural violations of respondents' rights.[4]

[3] The district court certified a class consisting of all Haitian aliens who arrived in the Southern District of Florida on or after May 20, 1981, who were applying for entry into the United States and who were presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion had not been entered and who were either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association. In its final judgment, the district court further modified the class certification by enlarging the class to include all detained Haitians for whom a counsel's notice of appearance form had been entered. *Louis* v. *Nelson*, 544 F. Supp. 1004, 1005, 1009 (S.D. Fla. 1982).

[4] Count 1 challenged the commencement of preliminary interviews of Haitian aliens without the presence of counsel or notice of the right to counsel; Count 3 challenged the failure to advise class members of their procedural rights at exclusion hearings; Count 4 (which rested, inter alia, on the First Amendment) challenged the denial of counsel; Count 5 challenged the denial of public exclusion hearings; Count 6 challenged the denial of the right to apply for political asylum; and Count 7 challenged the lawfulness of the program in its entirety under the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 90a; *Louis* v. *Meissner*, 532 F. Supp. 881, 883-884 (S.D. Fla. 1982).

Before trial, the district court dismissed on jurisdictional grounds all of respondents' claims except those based on the APA and the Fifth and First Amendments. *Louis* v. *Nelson*, 544 F. Supp. 973, 983 n.25 (S.D. Fla. 1982). After a five-week trial, the district court found respondents' constitutional claims to be without merit. *Id.* at 1001-1004. It ruled in favor of respondents on the APA claim, however, concluding that the revised parole policy should have been promulgated in accordance with notice-and-comment rulemaking procedures. *Id.* at 993-997.[5]

Petitioners appealed the district court's APA ruling. Respondents cross-appealed, pressing their equal protection and First Amendment claims, as well as the claims that had been dismissed before trial.

A panel of the Eleventh Circuit affirmed the district court's judgment with regard to the APA claim, but on a different rationale. The district court had relied (544 F. Supp. at 966-997) on criteria enunciated in *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701-702 (5th Cir. 1979), and *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), in concluding that the INS policy did not fall within the "general statement of policy" exception to the APA notice and comment requirement for rulemaking. The panel disagreed with those cases, and enunciated a different theory supporting the conclusion that no "general statement of policy" was involved.[6] In all

[5] The court subsequently declared that the new policy was "null and void" and that the prior policy was restored to "full force and effect." *Louis* v. *Nelson*, 544 F. Supp. at 1006. Accordingly, the court ordered that all class members in detention be released on parole under an interim plan, subject to certain terms and conditions. *Id.* at 1006-1009.

[6] The court of appeals panel stated, however, that "[i]n all fairness to the district court, analyzing a rule within the general statement of policy exception is akin to wandering lost in a Serbonian Bog. The term itself • • • offers little guidance. • • • The legislative history

other respects, the appellate court reversed the district court's post-trial judgment; in addition, it concluded that several of the claims should not have been dismissed before trial and remanded the case for further factual development. *Jean* v. *Nelson*, 711 F.2d 1455 (11th Cir. 1983).

The panel opinion was vacated when rehearing en banc was granted. *Jean* v. *Nelson*, 714 F.2d 96 (11th Cir. 1983). The en banc court dismissed in part, reversed in part, and remanded with instructions. *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984). All members of the en banc court agreed that the APA claim was moot because petitioners had, subsequent to the district court's decision, promulgated regulations in accordance with the APA, and because the only persons remaining in detention in the wake of the district court's order granting parole (see note 5, *supra*) "either had their parole revoked for failure to comply with the terms of the district court's order * * * or arrived in this country after the government's promulgation of its new regulations." 727 F.2d at 962. Accordingly, the en banc court dismissed the government's appeal as to the APA issue and remanded with directions "that the injunctive relief grounded on the claimed APA violation be vacated." *Id.* at 984.[7]

Although the en banc court held that the petitioners' parole policy was not subject to a constitutional due process attack, it stated that excludable aliens "do have rights

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offers little guidance. * * * The Supreme Court has yet to offer a definitive test." 711 F.2d at 1480 (citations omitted).

[7] The district court did not immediately comply with the court of appeals' directive. Instead, on May 7, 1987, it simply vacated certain reporting requirements in the injunction. Petitioners appealed and, on September 2, 1988, the court of appeals reversed and remanded with directions that the injunction be vacated. *Jean* v. *Nelson*, 854 F.2d 405 (11th Cir.). On January 31, 1989, the injunction was finally lifted.

* * * to whatever process Congress—and through its regulations and established policies, the Executive branch—have extended them" (727 F.2d at 984). It accordingly remanded the case for further review to determine whether the class members had been afforded those rights. *Ibid.*

This Court then granted respondents' petition for a writ of certiorari, which addressed only the equal protection issue. The Court found it unnecessary to reach that issue, however, because the new regulations promulgated by the INS provided respondents with nondiscriminatory parole consideration—"all they seek to obtain by virtue of their constitutional argument." *Jean* v. *Nelson*, 472 U.S. at 855. The Court therefore affirmed the en banc court's judgment insofar as it remanded the case to the district court for a determination as to whether INS officials were acting in compliance with the new regulations. On the remand, respondents obtained no further relief.

3. On December 6, 1985, after the merits litigation had finally come to a close, the district court found that respondents were entitled to an award of fees, costs and expenses under EAJA. Pet. App. 88a-99a. Although recognizing that respondents did not prevail on their constitutional claims, the district court found that they were "prevailing parties" for purposes of EAJA because petitioners' appeal of the district court's APA ruling was dismissed, and respondents had secured the "two primiary goals" (*id.* at 89a-90a) of the litigation—"[petitioners] stopped the accelerated mass exclusion hearings and class members were released from indefinite incarceration" (*id.* at 90a-91a). The district court also found that petitioners' position on the APA issue was without substantial justification in law or fact (*id.* at 92a-95a).

After a hearing devoted to the reasonableness of the hours and the rates claimed, the district court issued a fur-

ther order establishing the amount of the EAJA award to respondents (Pet. App. 46a-87a).[8] In determining the number of hours reasonably expended in the litigation, the court considered and applied the 12 factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Pet. App. 54a-67a. In addition, it concluded that "some award is in order for counsel's efforts in the Supreme Court," and awarded fees for 25% of the hours spent in that portion of the litigation. *Id.* at 69a-70a.

Turning to consideration of the hourly rates to be applied in computing the award, the court held that respondents were entitled to rates in excess of the EAJA statutory cap of $75 an hour because of an increase in the cost of living and the limited availability of qualified counsel; it made no attempt to quantify the impact of either of these two factors. Pet. App. 72a-74a. The hourly rates awarded by the district court ranged from $50-$175 per hour. The district court then held that respondents were entitled to an additional 15% enhancement for four reasons: the pro bono publico nature of the case, the vindication of public rights, the emotional pressure on respondents' counsel and the government's litigious position. *Id.* at 74a-77a.[9]

Finally, the district court awarded respondents fees for the hours expended in litigating the fee award itself. In so ruling, the court did not consider whether the government's position in the fee litigation was substantially justified. It held such an inquiry was not required by

[8] The opinion reprinted at Pet. App. 46a-87a is a revision of the one originally entered by the court on August 29, 1986, which was vacated in response to respondents' motion for "amplif[ication]" of the award. See *id.* at 46a n.1.

[9] In its original August 29, 1986 opinion, the district court based its 15% enhancement on the limited availability of counsel, the risk of loss, the quality of work, and the results achieved.

EAJA, relying (*id.* at 84a-85a) on the statement in *Haitian Refugee Center, Inc.* v. *Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986), that "we * * * decline to hold that this court may award fees for fees only if the government's position in the fees litigation was not substantially justified."[10] In total, the district court awarded respondents more than $1 million in attorney's fees, including more than $101,500 for their work on the fee petition. Pet. App. 85a, 86a-87a.

4. The court of appeals affirmed the district court's determination that the respondents were prevailing parties and that the government's position was not substantially justified (Pet. App. 11a-17a),[11] but vacated and remanded for a recalculation of the award (*id.* at 41a). Agreeing with petitioners, the court of appeals found that the district court had erred in awarding fees for respondents' unsuccessful Supreme Court litigation, because "[respondents] did not prevail on any legal issue or obtain any additional relief" in that phase of the litigation (*id.* at 18a-20a). The court also disapproved the district court's determination of the appropriate hourly rates. It found, first, that the proper starting point was the prevailing market rates for services of the kind and quality provided, not the factors listed in *Johnson* v. *Georgia Highway Express, Inc.*, *supra*. Even if the requested hourly rates did reflect pre-

[10] That portion of the *Haitian Refugee Center* opinion was subsequently vacated. *Haitian Refugee Center* v. *Meese*, 804 F.2d 1573, 1574 (11th Cir. 1986). See Pet. App. 38a.

[11] Like the district court, the court of appeals reached this conclusion by focusing solely on the government's position on the APA issue. Despite its earlier recognition that determining the scope of the exception for general statements of policy is "akin to wandering lost in a Serbonian Bog" (see note 6, *supra*), the court of appeals agreed that the government was not substantially justified in taking the position that the statement of the new parole policy was not a "rule" subject to the APA notice and comment requirement. Pet. App. 13a-17a.

vailing market rates, however, "the district court must still find that a cost of living increase or a 'special factor' justifies hourly rates of more than $75 before it can award fees at a rate in excess of this figure." Pet. App. 25a-26a. Here, the district court had failed to quantify in dollar amounts the impact of the cost of living on the overall fee award.

The court of appeals next considered the district court's conclusion that the limited availability of counsel warranted hourly rates in excess of the $75 cap. Although the appellate court acknowledged that *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2554 (1988), precluded consideration of the general level of competence of counsel or "a mere short supply of qualified lawyers willing to take a case for $75 an hour" (Pet. App. 28a) as a "special factor" justifying an enhanced hourly rate, it directed the district court to consider, upon remand, whether expertise in immigration law or fluency in French and Haitian Creole constituted such "special factors." *Id.* at 28a-29a.[12]

The court of appeals then rejected three of the four factors that the district court had relied on to justify an additional 15% enhancement of the fee award—the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel. The panel majority nevertheless concluded that the government's "litigiousness" in this case might be a special factor which would justify an increased award. Pet. App. 30a-33.[13]

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[12] The majority noted, however, that the attorney who had expertise in French and Haitian Creole had not requested an hourly rate in excess of $75. Pet. App. 29a.

[13] The dissent disagreed with the basis for the calculation of the cost of living adjustment, with the conclusion that the government's asserted litigiousness might be a "special factor," and also with the conclusion that competence in immigration law might be such a factor. Pet. App. 41a-45a.

Finally, the court of appeals concluded that the district court had not erred in awarding more than $100,000 in fees for work on the fee litigation without considering whether the government's position in that litigation was substantially justified. The court recognized the division in the circuits on this issue (Pet. App. 38a) but, agreeing with the approach taken by the Second Circuit in *Trichilo* v. *Secretary of Health & Human Services*, 823 F.2d 702, 707 (1987), concluded that "the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim 'fees for fees' " (Pet. App. 39a-40a). Asserting that "[i]t would contravene Congress's purpose in passing the EAJA to require under all circumstances that successful EAJA fee applicants bear the costs of obtaining EAJA fees," the court expressly reserved the question "whether a 'technical defense' exception to [the liability] rule should exist" (*id.* at 40a, 41a, n.14).[14]

SUMMARY OF ARGUMENT

The Equal Access to Justice Act is a limited waiver of sovereign immunity and, as such, may not be enlarged beyond what its language requires. Unlike other attorney's fee statutes, EAJA does not contemplate automatic fee-shifting. Instead, eligible prevailing parties may be awarded fees and costs only if the court finds that the

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[14] The reservation apparently referred to the suggestion of the D.C. Circuit in *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 214 (1986), that the government may "raise certain technical defenses, such as an untimely filing by the fee applicant, and defend against an application for 'fees for fees' on the ground that the technical defense is substantially justified." See Pet. App. 39a.

government's position was not substantially justified. Congress viewed this standard as striking the proper balance between the competing interests of assisting parties to challenge unreasonable governmental actions while at the same time assuring vigorous law enforcement.

A rule holding the government automatically liable for fees for litigation over a fee petition ("fees for fees") whenever its position on the merits portion of the litigation is not substantially justified imposes a standard for fee litigation that is more stringent than the statutory standard, without any basis in the Act for such a distinction. Moreover, such a rule disturbs the careful balance of objectives that Congress adopted. The government should not be forced to pay twice—once for its own attorneys and again for the fee claimant's attorneys—in order to challenge an exorbitant fee request or seek clarification of one or more of the unique provisions of EAJA. And because it requires the government to bear the costs of all fee litigation—even where the government's position in the fee litigation is not only reasonable, but also correct—the automatic rule also removes the usual incentives for a prevailing party to make a reasonable fee request or to consider settlement.

In contrast, requiring courts to inquire specifically into the reasonableness of the government's fee litigation position maintains the balance that EAJA was intended to achieve. If the government makes unreasonable fee arguments, it will have to pay fees for fees. Otherwise, it will not. Such a rule also encourages reasonable requests by fee applicants and reasonable responses by the government, thereby discouraging repetitive fee litigation.

The substantial justification rule may, of course, result in a prevailing party not being reimbursed for all of its litigation costs. But that is entirely consistent with other provisions of EAJA, which impose a cap on the hourly

rates that may be recovered, and limit recovery to hours that the court determines are reasonable. Moreover, application of this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), may mean that a prevailing party does not receive compensation for hours spent on all claims in the litigation. If a claim by claim analysis can be required for making fee awards under 42 U.S.C. 1988, which does not have a "substantial justification" element, then *a fortiori*, it is appropriate for courts to consider separately the reasonableness of the government's position in fee litigation under EAJA. Finally, although the substantial justification rule creates a theoretical possibility of an "infinite regression" of inquiries into whether the government was substantially justified in taking a position at an earlier stage in the litigation, as a practical matter the government would have no incentive to litigate in this manner, and there is no evidence that this hypothetical concern has materialized in any of the circuits that have adopted the rule.

If the Court rejects our primary submission, we note that the rule suggested in *Russell* v. *Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), vacated on other grounds, 108 S. Ct. 2891 (1988), although less consonant with the language and rationale of EAJA than the substantial justification rule, at least avoids the "infinite regression" problem without incurring the same adverse policy consequences as the automatic fee shifting rule adopted by the court of appeals. The *Russell* rule would provide for the automatic award of fees for fees with respect to litigation over whether the government's merits position was substantially justified. But when the fee litigation involves other issues—such as whether an application was timely filed, whether the applicant was a prevailing party, or what the proper hourly rate should be—fees for fees would be awarded only if the court concludes that the

government's position in the fee litigation was not substantially justified.

ARGUMENT

I. THE GOVERNMENT SHOULD BE LIABLE FOR FEES FOR FEES UNDER EAJA ONLY WHEN ITS POSITION IN THE FEE LITIGATION WAS NOT SUBSTANTIALLY JUSTIFIED

The Equal Access to Justice Act waives the sovereign immunity of the United States to allow parties who prevail in litigation against the United States to recover attorney's fees and expenses in certain defined circumstances subject to several important limitations. See generally *Pierce* v. *Underwood, supra*. It does not provide for automatic fee shifting. Instead, EAJA directs that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. 2412(d)(2)(B)) who prevails in a civil nontort action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A)).[15] Like all waivers of sovereign immunity, EAJA must be construed "strictly in favor of the sovereign," taking care not to "enlarge the waiver 'beyond what the language requires.'" *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986).

The question presented by this case—whether a determination that the government's position on the merits was not "substantially justified" means the government must automatically pay any additional fees incurred by the applicant in ligitation over the availability and size of the fee award—is not specifically addressed by the statute, and the courts of appeals have reached conflicting answers to

[15] This Court determined in *Pierce* v. *Underwood*, 108 S. Ct. at 2550, that the statutory term "substantially justified" means "justified in substance or in the main."

the question.[16] In our view, it is appropriate to include reasonable fees and expenses incurred in preparing a fee *application* as part of any award of fees for the merits phase of the litigation.[17] But the language and purposes

[16] The court below followed the approach of the Second Circuit in *Trichilo* v. *Secretary of Health & Human Services*, 823 F.2d 702 (1987), holding the government automatically liable for fees for fees whenever its position on the merits is not substantially justified. Accord *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d 1468 (1st Cir. 1989). Several circuits have required a separate inquiry into the justification for the government's position in the fee litigation. See *National Wildlife Federation* v. *Federal Energy Regulatory Comm'n*, 870 F.2d 542 (9th Cir. 1989); *Cornella* v. *Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Continental Web Press, Inc.* v. *NLRB*, 767 F.2d 321, 324 (7th Cir. 1985). In our petition, we also included *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985), on that list. In its recent decision in *Powell* v. *Commissioner*, 891 F.2d 1167, 1172 (5th Cir. 1990), however, a different panel of the Fifth Circuit characterized the *Russell* discussion on the fees for fees issue as dicta, and adopted the "automatic" rule.

In *Russell* v. *Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), vacated on other grounds, 108 S. Ct. 2891 (1988), the court adopted an intermediate position, stating that the government will almost inevitably be liable for fees in the fee litigation if its sole claim is that it was substantially justified in arguing that its position on the merits was substantially justified; otherwise, however, an independent evaluation of the merits of the government position in the fee litigation is necessary. See discussion pp. 31-32, *infra*. Finally, in *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 213 (D.C. Cir. 1986), the court, although "indicat[ing] a preference" for the automatic rule, suggested that such a rule would not apply when the government raised a "technical defense" to the payment of EAJA fees. See note 34, *infra*.

[17] Accordingly, we do not object to the conclusion drawn by the court in *Kelly* v. *Bowen*, 862 F.2d 1333, 1334-1335 (8th Cir. 1988), that reasonable fees and expenses incurred in preparing the EAJA fee application are compensable as part of the merits litigation. Accord *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d at 1482 (Selya, J., concurring in part). As the court explained in *Kelly* (862 F.2d at 1334-1335):

of EAJA indicate that the government should not be required to pay for attorney's fees and expenses incurred in separate *litigation* over the availability and size of the fee award unless the position of the government in this distinct phase of the case was not substantially justified.

A. The Language And Purposes Of EAJA Do Not Allow The Automatic Award Of Fees For Fees

The automatic award of fees for fees endorsed by the court of appeals in this case finds no support in the

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We think the time spent preparing the EAJA fee application should be compensable under the EAJA because it is "necessary for the preparation of the party's case." 28 U.S.C. § 2412(d)(2)(A). Preparation of the EAJA fee application is necessary to bring the matter before the court; counsel cannot recover any attorney's fees unless he or she first prepares an itemized statement of the time spent and subject matter discussed. Counsel must prepare the EAJA fee application whether or not the government subsequently decides to contest the amount of the attorney's fees claimed or the award of attorney's fees.

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Whether or not counsel is entitled to recover additional attorney's fees in connection with litigation over the propriety of attorney's fees awarded is a separate question.

Any award of fees for the preparation of the fee application should, of course, be subject to the overarching "reasonableness" limitation. It would not, for example, permit routine recovery for apparently exorbitant fee application requests—as, for example, respondents' claim of attorney fees and expenses for travel between Miami and Los Angeles as part of the expenses of preparation of the fee application. 10 Resp. C.A. Br. App., Tab 47 (Weisz Affidavit with reference to Attorneys' Fees). Cf. *Abel Converting, Inc.* v. *United States*, 695 F. Supp. 574 (D.D.C. 1988) (approximately 110 hours claimed for fee petition; reduced to approximately 46 hours). But as long as the amount of time and the rates claimed are reasonable, we would not oppose the inclusion of the time for preparation of the fee request in the calculation of the attorney fee for the merits litigation.

statutory language of EAJA. Nothing in that language indicates that fees for fees should be awarded automatically for any distinct phase of the litigation unless the government's position is found to lack substantial justification. The statute simply provides that fees are to be awarded to the prevailing party unless the "position of the United States" was substantially justified (28 U.S.C. 2412(d)(1)(A)). Fee litigation is different from litigation over the merits; the issues presented are not the same. Fee litigation is nevertheless part of the "civil action," and the "substantial justification" requirement therefore applies in full. To hold that the government is *automatically* liable for fees for fees is to impose a standard of liability for the fee litigation phase of the action that is different from (and much more stringent than) the standard set forth in the Act, without any statutory justification for doing so.

Although the statute defines "position of the United States" to include both the position taken in the underlying civil action and the action or failure to act upon which the civil action is based (28 U.S.C. 2412(d)(2)(D)), nothing in the statute refers specifically to the government's position in the fee litigation; there is certainly no suggestion that fees are to be paid for such litigation regardless of substantial justification. Surely, if Congress had intended to impose a different standard for the fee litigation, it would have said so. The statute, however, contains only a single standard: substantial justification.[18]

Indeed, to the extent that the statutory language addresses the issue, it suggests that Congress viewed the fee

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[18] This Court observed in *Pierce* v. *Underwood*, 108 S. Ct. at 2549, that "we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it;" it is at least equally inappropriate to substitute a different standard for the fee litigation stage of the case.

litigation as a separate phase of the case, to be treated separately for the purposes of substantial justification analysis. The statute defines the term "fees and other expenses" to include the expenses "necessary for the preparation of the party's case" (28 U.S.C. 2412(d)(2)(A)); the implication is that attorney's fees are to be similarly limited to those required for the presentation of "the party's case"—*i.e.*, the case on the merits.[19] Once the case proceeds to litigation over the fees, it enters a new phase, and fees and expenses may be awarded as "necessary for the preparation" and presentation of *that* case only if the government's position at that stage is not substantially justified.

An automatic rule would also be inconsistent with the purposes of EAJA. In adopting the "substantially justified" standard, Congress specifically considered and rejected an automatic fee award. S. 2354, which was introduced in the 95th Congress, provided for automatic awards to prevailing parties. This mandatory award "was rejected because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 13-14 (1980). A purely discretionary standard was also considered. It too was rejected, in part because it "offers little direction to the exercise of agency [or judicial] discretion." *Id.* at 14. Congress also rejected a Department of Justice proposal that would have made fees available only where the prevailing party could prove that the government action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to

[19] It would be quite anomalous to have different standards for the payment of fees and of "other expenses," and nothing in the Act or its legislative history suggests any such distinction.

litigate after it clearly became so."[20] Congress believed that this standard would make fees too difficult to obtain, and thus, "the deterrent effect created by the cost of vindicating rights vis-a-vis the government would not be lessened." *Ibid.*

Congress viewed the "substantially justified" standard as an "acceptable middle ground" between an automatic award of fees and the restrictive federal proposal (*ibid.*), one which properly "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." S. Rep. No. 253, 96th Cong., 1st Sess. 6 (1979); cf. H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985) (disavowing intent to "chill public officials charged with enforcing the law from vigorously discharging their responsibilities. * * * The Committee recognizes [and] reaffirms the importance of federal enforcement of federal law * * *.").

The automatic award of fees for fee litigation would require the government to pay additional fees whenever it interposed an objection to an EAJA fee award—no matter how meritorious that objection might be. In this case, for example, the government advanced legal objections to a number of features of respondents' fee applications. We argued that respondents were not entitled to any compensation for their work before the Supreme Court; the court of appeals agreed. We also pointed out that the district court had failed to quantify what portion of the increased hourly rate was due to an increase in the cost of living; the appellate court agreed with that contention as well. Finally, the court of appeals agreed with our submission that

[20] This standard was based on the standard for the award of attorney's fees to prevailing defendants in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). See *Christiansburg Garment Co* v. *EEOC*, 434 U.S. 412, 422 (1978).

the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel did not constitute "special factors" justifying an enhanced fee award. But even though the appellate court plainly agreed with several of the government's fee arguments and, for that reason, vacated the fee award and remanded the case for further proceedings, the court nevertheless held that the government's position in the fee portion of the case was irrelevant to the question of libability for fees for fees. Thus, the "automatic" rule applied by the court of appeals requires the government to pay respondents' fees even though the government's litigating position was reasonable—indeed, even though the government in fact prevailed on many of these issues.

Penalizing the government for making fee arguments that are not only substantially justified, but are also correct, is clearly contrary to the language and purpose of EAJA, which was carefully crafted so that it would not deter the government from taking reasonable positions. H.R. Rep. No. 1418, *supra*, at 10-11, 13-14; H.R. Rep. No. 120, *supra*, at 10. Fee requests may be exorbitant,[21] and there is no indication Congress intended to discourage the government from contesting such requests. In addition, EAJA contains many novel provisions, and the usual way to explicate such provisions is by seeking an authoritative judicial interpretation. Congress must therefore have anticipated that there would be litigation to

[21] See, *e.g.*, *Van Sant* v. *United States Postal Services*, 805 F.2d 141, 142 (4th Cir. 1986) ($194,162 fee request, $5,000 awarded; hours claimed "grossly inflated"); *Digennaro* v. *Bowen*, 666 F. Supp. 426 (E.D.N.Y. 1987) (130.5 hours claimed, reduced to 45 hours); *Illinois Migrant Council* v. *Pilliod*, 672 F. Supp. 1072 (N.D. Ill. 1987) (724 hours claimed, reduced to 424 hours); *Poslednik* v. *Sullivan*, 718 F. Supp. 1097 (S.D.N.Y. 1989) (more than 200 hours claimed, reduced to 80.5 hours).

define the proper application of such statutory terms as "position of the United States" (see cases cited at H.R. Rep. No. 120, *supra*, at 9 n.14), "substantial justification" (*Pierce* v. *Underwood*, *supra*), or "special factor[s]" justifying an award at a rate in excess of the statutory fee cap (*ibid*). There is no suggestion in the statute or its legislative history that Congress intended to deter the government from litigating such issues, so long as its position with regard to them was substantially justified.

In sum, the fees for fees rule adopted by the court below turns EAJA into an automatic fee shifting statute, which is not what Congress intended and not what the statutory scheme prescribes. Cf. *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983) (under EAJA, the government cannot be directed to pay fees for its reasonable positions in a case); *Matthews* v. *United States*, 713 F.2d 677, 684 (11th Cir. 1983) (same). There can be little doubt that such a rule would "chill public officials charged with enforcing the law from vigorously discharging their responsibilities." H.R. Rep. No. 120, *supra*. The government will surely be less inclined to resist questionable or exorbitant fee requests when the costs of challenging such requests will always include not only the government's own litigating expenses, but the opposing party's as well.[22] Such a tax on government efforts to advance reasonable litigating positions is plainly contrary to the careful balance Congress sought to strike when it enacted EAJA.

[22] EAJA awards must be paid by the agency "from any funds made available to the agency by appropriation or otherwise" (28 U.S.C. 2412(d)(4)), not from the judgment fund. Cf. 131 Cong. Rec. S9995 (daily ed. July 24, 1985) (remarks of Sen. Weicker) ("all claims paid by the agency will be paid out of [the] agency's annual budget and not from agency requests for additional funds"). The possibility of large EAJA awards is accordingly particularly troubling for agencies with relatively small appropriations.

B. The Definition Of "Position Of The United States" Does Not Justify A Rule Of Automatic Fees For Fees

Courts of appeals that have adopted the automatic rule have relied at least in part on the fact that in 1985, Congress amended EAJA to add a definition of "position of the United States." [23] See, *e.g.*, *Powell* v. *Commissioner*, 891 F.2d 1167 (5th Cir. 1990); *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d 1468 (1st Cir. 1989); *Trichilo* v. *Secretary of Health & Human Services, supra*. The amendment was added to make clear that the term included not only the government's litigating position, but also the underlying agency action or inaction that was the basis of the litigation. Nothing in the amendment itself, therefore, bears on the "fees for fees" issue.[24] The courts have instead relied on the legislative history, which explains that the amendment was made out of the following concern:

> If the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed

[23] As noted at pp. 16-17, *supra*, under that definition, "position of the United States" includes not only the position taken by the government in the civil action, but also the action or failure to act by the agency which gave rise to the litigation.

[24] As Senator Charles Grassley, one of the sponsors of the bill containing the amendment, explained in presenting the bill to the Senate, "the purpose of the Equal Access to Justice Act is to make Government bureaucrats think long and hard before they start an enforcement action. The focus of the Equal Access to Justice Act is not on making Government litigators behave once in court" (131 Cong. Rec. S9992 (daily ed. July 24, 1985). The special fees for fees rule applied by the court below does, of course, focus precisely on the behavior of government litigators in court, and penalizes the government for litigating EAJA issues.

> "reasonable" litigation positions; thereby having the effect of substantially justifying their position. Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980.

H.R. Rep. No. 120, *supra*, at 12 (citation omitted). This statement of purpose, however, does not support an automatic fees for fees rule.

If the underlying agency action is unreasonable, an aggrieved citizen will inevitably incur some expense in challenging that action in court, even if only to file a complaint and negotiate a settlement. Thus, Congress concluded that it is proper to award such a citizen reasonable attorney's fees for establishing that the underlying action is unlawful, notwithstanding that the government's conduct of the litigation itself is substantially justified. It does not follow, however, that a person who has suffered unreasonable agency action should automatically be awarded whatever attorney's fees he incurs in subsequent stages of the litigation, whether it be in defining the appropriate relief to be awarded,[25] in litigating appeals, or in determining the availability and amount of attorney's fees. The careful balance Congress sought to establish when it enacted EAJA can be maintained only if a separate "substantial justification" inquiry is undertaken for these distinct stages in the litigation.

In many cases, for example, even if the court concludes that the government's underlying position regarding

[25] We note that a somewhat analogous question, in the context of appeals taken from a district court's imposition of Rule 11 sanctions, is presented in *Cooter & Gell* v. *Hartmarx Corp.*, No. 89-275 (argued Feb. 20, 1990).

liability was not substantially justified, its position as to the appropriate scope of relief may be entirely justified. For instance, in an immigration case, even if the court finds that the Board of Immigration Appeals has acted unreasonably in denying a request for suspension of deportation and grant of permanent resident status pursuant to 8 U.S.C. 1254(a)(1), it does not follow that the government would be acting unreasonably in insisting that the court remand the case to the Board for reconsideration of that request rather than granting suspension of deportation outright. This is in fact what the law requires. *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77 (1957). See, *e.g.*, *Chung* v. *INS*, 602 F.2d 608 (3d Cir. 1979) (remanding to Board for reconsideration of suspension of deportation under proper standards); *Wang* v. *INS*, 413 F.2d 286 (9th Cir. 1969) (same). Thus, if a claimant in such a case were to demand that the court itself grant him Section 1254(a)(1) relief, it would make no sense to require the government to reimburse the claimant for his attorney's fees in advancing such an inappropriate claim. Similarly, there may be cases where the government would not be substantially justified in opposing relief in the district court, but would be substantially justified in taking an appeal, for example if there had been an intervening change in the law. Alternatively, there will be cases—such as this one—where the government may not be substantially justified in opposing all relief in the district court, but is substantially justified (indeed, prevails) in resisting a cross-appeal seeking a finding of liability on other grounds.

For the same reasons, the fact that the government is not substantially justified in the position it takes on the merits in litigation should not mean that an award of fees for fees is automatically appropriate, without regard to

the reasonableness of the position taken by the government in the fee stage of the litigation. Fee litigation is separate from the merits portion of a case. If the underlying agency conduct or the government's position in the merits litigation is unreasonable, the government will be liable for fees for the merits portion of the case. Similarly, if the government's position on the fees portion of the case is not substantially justified, the government will be held liable for fees for fees. But the "incentive for careful agency action" is in no way diminished if the government is not required to pay fees for fees when its position in that portion of the case is substantially justified.[26]

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[26] In the same remarks cited above (note 24), Senator Grassley stated that:

> Consistent with the general rule that successful litigants are ordinarily entitled to fees for their litigation of a fee application, a prevailing Equal Access to Justice Act party is eligible to recover attorney's fees for the fee litigation itself, subject to the Equal Access to Justice Act's terms, in any case in which the Government's position in the case, as defined in the bill, was not substantially justified.

131 Cong. Rec. S9992 (daily ed. July 24, 1985). Senator Grassley's statement does not suggest that EAJA prevailing parties are automatically entitled to fees for fees. Instead, they are "eligible" for such fees, "subject to the Equal Access to Justice Act's terms"—*i.e.*, if the government's position in the fee litigation was not substantially justified. Senator Grassley's statement apparently contemplates that a separate inquiry should be made into the reasonableness of the government's position in the fee litigation itself. If the government's position in that litigation is found to be unreasonable, then fees for fees may be awarded.

C. Policy Considerations Do Not Justify An Automatic Award Of Fees For Fees

Nor does the fact that prevailing parties are generally awarded fees for fees under other fee shifting statutes mean such fees should be routinely awarded under EAJA. As the court of appeals itself recognized (Pet. App. 30a), EAJA constitutes a partial waiver of the government's sovereign immunity, and must, therefore, be strictly construed according to its particular terms. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 686 (1983); *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). The courts should not, in the guise of interpreting its terms, transform it into an automatic fee shifting statute by disregarding the "substantial justification" proviso.

In particular, policy arguments cannot substitute for a congressional waiver of immunity. In *Library of Congress* v. *Shaw*, *supra*, the issue was whether Congress, in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, had waived the government's immunity from interest. Respondent in that case argued that the policy reasons that had motivated Congress to permit recovery of a "reasonable" attorney's fee required that the statute be read to waive the government's immunity from interest. This Court rejected that argument (478 U.S. at 321):

> [P]olicy, no matter how compelling, is insufficient, standing, alone to waive this immunity:
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> > "[T]he immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. [654], 663 [(1947)]."

Similarly, in this case the statutory standard for awarding fees to the prevailing party "unless * * * the position of the United States was substantially justified" (28 U.S.C. 2412(d)) cannot be overcome by resort to policy arguments. In any event, we submit that policy considerations support the substantial justification limitation Congress selected, for fee litigation no less than for the merits.

Requiring courts to make a separate inquiry into the reasonableness of the government's fee litigation position maintains the careful balance that Congress established in EAJA: if the government makes fee arguments that are not reasonable, it will have to pay the prevailing party fees for fees, but otherwise it will not. The substantial justification rule thus retains the deterrence factor that Congress intended, while at the same time allowing the government to carry out its duty to protect the public fisc. It also gives prevailing parties every incentive to make reasonable fee requests, thus minimizing the burdens on the courts, as well as the parties, of further litigation over fee applications.[27]

It is of course true that conducting a separate inquiry into the reasonableness of the government's position in the fee portion of the case may result in a prevailing party not receiving compensation for all of its litigation expenses.[28]

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[27] This litigation-minimizing effect of the substantial justification rule offsets the apparent ease of application of an automatic rule. Of course, even if the balance tipped the other way, that would not justify a judicial rewrite of EAJA. As the dissent observed in *McDonald*, 884 F.2d at 1483, "we have no right, in the name of judicial economy, to expand EAJA's sweep or to open the sovereign's coffers more widely than Congress intended."

[28] This does not mean that prevailing parties will be given a life line that is "a foot short." See *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2256 (1989). If the prevailing party makes a fee request that is reasonable, the government should ordinarily be expected to go along with it; the party would also recover fees for the time reasonably spent in preparing the request (see note 17, *supra*). If, on the other hand, the government, without substantial justification, opposed a reasonable fee request and thereby provoked unreasonable litigation over fees, EAJA would permit the court to hold the government liable for such fee litigation.

But Congress evidently contemplated that EAJA prevailing parties would not necessarily be compensated for all their legal expenses, since it provided a statutory cap on the hourly rate at which fees are to be awarded. Cf. *Pierce* v. *Underwood*, 108 S. Ct. at 2554 ("Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be."). In addition, EAJA, like other fee shifting statutes, limits the fees that can be recovered to "reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A). See *Hensley* v. *Eckerhart*, 461 U.S. 424, 434 (1983) ("The district court also should exclude from th[e] initial fee calculation hours that were not 'reasonably expended.' "). The fact that counsel has billed a prevailing party for a certain number of hours thus does not mean that the fee award will also cover all those hours, since the number of hours may be excessive. See, *e.g.*, *Poslednik* v. *Sullivan*, 718 F. Supp. 1097 (S.D.N.Y. 1989).

It is also true that the substantial justification approach, unlike the automatic rule, will require the court to consider separately the justification for the government's fee litigation. But courts are often required to examine a party's claims in deciding the appropriate amount of a fee award. In *Hensley* v. *Eckerhart, supra*, this Court provided guidelines for calculating awards to "prevailing parties" under fee shifting statutes.[29] Where claims are based on different facts and legal theories, "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." 461 U.S. at 435

[29] Although *Hensley* itself arose under 42 U.S.C. 1988, the Court noted that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " 461 U.S. at 433 n.7.

(footnote omitted). Moreover, if the plaintiff obtains only limited success on various claims that involve a "common core of facts" or "related legal theories," then a fee award compensating him for all of the hours spent in the litigation would not be reasonable. *Ibid.*[30] In short, in determining the fee to be awarded to a prevailing party who has not been completely successful in the litigation on the merits a court must undertake a careful examination of the claims being made as well as the facts and legal theories underlying them. See also *Texas State Teachers Ass'n* v. *Garland Independent School District*, 109 S. Ct. 1486, 1493 (1989).

Since a court must, under this Court's teaching in *Hensley*, make a careful examination of each *claim* when the only criterion for the fee award is that the party has "prevailed," it is not unreasonable to expect a court to consider the reasonableness of the government's position in various *stages* of the litigation when Congress has expressly added the "substantial justification" requirement to the attorney's fee statute. *Porter* v. *Heckler*, 780 F.2d 920, 922 (11th Cir. 1986).

Finally, it is also true, at least as a theoretical matter, that inquiring into whether the government was substantially justified in arguing in fee litigation that its position on the merits was substantially justified could lead to an "infinite regression," with the government asserting in response to each succeeding fee application that its defense to the preceding application was substantially justified. See *Cinciarelli* v. *Reagan*, 729 F.2d 801, 810 (D.C. Cir. 1984). But while such a scenario is perhaps imaginable, it has not developed in any of the circuits that apply the substantial justification rule to fee litigation. This is

[30] In contrast, if the plaintiff has achieved "excellent results" on such interrelated claims, he should receive a "fully compensatory fee." 461 U.S. at 435.

scarcely surprising: as a practical matter the government would have little or no incentive to invite a court repeatedly to add on to the fee litigation bill once that court has determined that the government's fee position was not substantially justified—particularly since the government could prevail on appeal only by demonstrating that the "no substantial justification" determination was an abuse of discretion. *Pierce* v. *Underwood*, 108 S. Ct. at 2548. It follows that the government will not lightly challenge findings that its position lacked substantial justification, and *a fortiori* that it will not engage in the sort of "infinite regression" of challenges that concerned the *Cinciarelli* court and the court below.

On the other hand, the automatic rule adopted by the court below will encourage prevailing parties to file unreasonable fee requests, since regardless of the merits of such requests, the government will have to bear all the costs of litigating them.[31] Indeed, as the dissent observed in *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d at 1482-1483:

> The more esurient the request, the more likely the government will oppose it; the more heroic the opposition, the more time will reasonably be spent litigating the matter; the more protracted the litigation, the greater the number of hours reasonably expended on it; the more hours spent, the higher the fee award (notwithstanding whatever trimming may be done in the name of 'reasonableness').

[31] See note 22, *supra*. To avoid this burden, the government could, of course, simply acquiesce, and agree to pay even unreasonable fee requests. Nothing in EAJA suggests that Congress intended to encourage the government to adopt that policy. See p. 20, *supra*.

Thus, the automatic rule will further burden the courts with what this Court in *Pierce* v. *Underwood*, 108 S. Ct. at 2548, recognized as litigation unlikely to result in "law-clarifying benefits".

Moreover, since a prevailing party will have nothing to lose by litigating the fee request, the automatic rule undermines the incentive to settle and thus is likely to discourage settlement of fee disputes.[32] Indeed, such a rule, much more than any prospect of "infinite regression of EAJA litigation" (Pet. App. 38a), is likely to multiply the amount of time the courts and the parties devote to judicial proceedings contesting matters related to attorney's fees. No reasonable policy supports such an invitation to protracted meritless litigation.

II. AT THE VERY LEAST, THE AUTOMATIC RULE SHOULD BE REJECTED FOR ISSUES OTHER THAN WHETHER THE GOVERNMENT WAS SUBSTANTIALLY JUSTIFIED ON THE MERITS

For the above reasons, we submit that the careful balance between the interests of private litigants and the need for effective law enforcement established in EAJA requires that private litigants be awarded fees for the fee litigation only when the government's position in that litigation is not substantially justified. If, contrary to this submission, the Court concludes that EAJA can and should be interpreted to provide more liberal reimbursement to those who have established that the government's position on the merits is not substantially justified, there is an alternative approach that, although for the reasons explained above we believe is less consonant with the statutory language and purpose than the substantial

[32] As this Court recognized in *Hensley*, 461 U.S. at 437, settlement is ordinarily the best way to dispose of a fee application.

justification rule, nevertheless avoids some of the adverse policy consequences of the automatic approach.

In *Russell* v. *Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), vacated on other ground, 108 S. Ct. 2891 (1988), the court of appeals stated that where the government's only claim in the fee litigation is that its position on the merits was substantially justified, and that claim is rejected, the government will be liable for fees for the fee litigation without further consideration of whether it was substantially justified in making that claim. On the other hand, when the government's opposition to the fee application is based on other issues—such as whether the claimant filed a timely EAJA application, or was a prevailing party, or is entitled to an enhanced rate above the $75 an hour cap—the substantial justification for those claims must be considered before fees may be awarded for the fee litigation. Cf. *United States* v. *Estridge*, 797 F.2d 1454, 1460 (8th Cir. 1986) (government's position in fee litigation not substantially justified where opposition to fee award based solely on claim that government position on the merits was substantially justified).

Although based in part on reasoning which is no longer valid,[33] the *Russell* rule does avoid the possibility of the "infinite regression of EAJA litigation" that has troubled

[33] The *Russell* court adopted the proposition, subsequently rejected in *Pierce* v. *Underwood*, *supra*, that a showing of substantial justification requires more than that the government's position be "merely reasonable." In its fees for fees analysis, the court apparently assumed that whenever a court in fee litigation rejects the government's contention that its position on the merits was substantially justified, the court necessarily also concludes that the government was not substantially justified in making that contention. This assumption incorrectly equates the rejection of an argument with the finding that there was no substantial justification for making the argument.

several courts (Pet. App. 38a).[34] At the same time, the *Russell* rule does not have the same litigation-encouraging effect as the automatic rule, since the prevailing party's incentive to make reasonable fee requests is retained. Finally, the *Russell* rule serves the interests of judicial economy. It will in many cases relieve the court from the necessity of evaluating the merits of the government's position in the fee litigation. And, to the extent that it discourages government challenges to fee applications based solely on the merits of the government's litigating position, that rule also minimizes fee litigation.

[34] The D.C. Circuit was motivated by concern for the asserted "infinite regression" problem when it suggested the "technical defense" exception to the automatic rule. *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 213-214 (1986); cf. *Powell* v. *Commissioner*, 891 F.2d 1167 (5th Cir. 1990) (noting, but reserving judgment about such an exception); *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d at 1481 n. 13 (same); Pet. App. 41a, n.14 (same). The court asserted in *American Academy of Pediatrics* that when the government raises a "technical defense" to a fee application, an award of fees for the fee litigation is appropriate only if that defense was not substantially justified. But if the court concludes that the technical defense was not substantially justified, the government is thereafter liable for all fees in the fee litigation, and it cannot subsequently argue that it was substantially justified in arguing that it was substantially justified in raising the technical defense. 795 F.2d at 213.

The defense asserted in *American Academy of Pediatrics* was that the fee application was not timely filed; the court did not define what other claims might be considered "technical" for purposes of its proposed rule. It did, however, note the possibility that a claim that an EAJA application contained an excessive number of hours might also be considered a "technical defense" (795 F.2d at 214). If the term "technical defense" were interpreted that broadly, it would appear to apply to virtually any defense other than substantial justification. In that event, the proposed D.C. Circuit rule would be indistinguishable from the *Russell* rule.

In short, although the *Russell* rule is less securely grounded in the language and purpose of EAJA than the substantial justification rule, and was adopted in response to concerns that we believe are more imaginary than real, it is nevertheless preferable to the automatic fees for fees rule adopted by the court of appeals.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
WILLIAM G. KANTER
MICHAEL JAY SINGER
MARY K. DOYLE
Attorneys

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